STATE OF MICHIGAN

COURT OF APPEALS

STANLEY TURNER, MARILYN TURNER, and DON TURNER, Plaintiffs-Appellants, v RONALD HARTMAN, Defendant-Appellee.	UNPUBLISHED June 23, 2005 No. 260522 Genesee Circuit Court LC No. 03-077535-NZ

Before: Gage, P.J., and Whitbeck, C.J., and Saad, JJ.

PER CURIAM.

Plaintiffs were among several people defrauded by Carl Smith, a formerly licensed stockbroker who sold plaintiffs non-existent securities between 1998 to 2001. Here, plaintiffs seek to impose individual liability on defendant, Ronald Hartman, under § 410 of the Michigan Uniform Securities Act (MUSA), MCL 451.810, as either a person "who directly or indirectly controls a seller . . ." or an "officer, or director of such a seller . . . ." Plaintiffs alleged that, at the time they bought the securities, Smith was employed by Diversified Financial Services, Inc. (Diversified Financial), and that defendant is liable as an officer, director, or control person of that corporation. The trial court granted summary disposition to defendant and ruled that defendant was not a control person, partner, officer, or director for Diversified Financial, which had been dissolved for failing to file annual reports. Plaintiffs appeal this order, and we reverse and remand for further proceedings consistent with this opinion.

I. Standard of Review and Applicable Statute

This Court reviews a trial court's ruling on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is appropriate under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The statute on which plaintiffs rely is MCL 451.810, which states:

> (b) Every person who directly or indirectly controls a seller liable under subsection (a), every partner, officer, or director of the seller, every person

> occupying a similar status or performing similar functions, every employee of the seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the person sustains the burden of proof that he or she did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

II. Analysis

A. Dissolution

The trial court erred when it relied on the dissolution of Diversified Financial to conclude that defendant cannot be liable as a partner, officer, or director of the seller. The parties agree that Diversified Financial failed to file annual reports after 1994, and that this resulted in automatic dissolution. MCL 450.1831(d) provides:

> A corporation is dissolved when any of the following occurs:
>
> * * *
>
> (d) Failure to file an annual report or pay an annual filing fee as provided in section 922.

The referenced section, MCL 450.1922, states in pertinent part:

> (1) If a domestic corporation neglects or refuses to file any annual report or pay any annual filing fee or a penalty added to the fee required by law, and the neglect or refusal continues for a period of 2 years from the date on which the annual report or filing fee was due, the corporation shall be automatically dissolved 60 days after the expiration of the 2-year period.

However, plaintiffs rely on MCL 450.1833, and maintain that the corporate existence of Diversified Financial continued after dissolution. The statute provides:

> Except as a court may otherwise direct, a dissolved corporation shall continue its corporate existence but shall not carry on business except for the purpose of winding up its affairs by:
>
> (a) Collecting its assets.
>
> (b) Selling or otherwise transferring, with or without security, assets which are not to be distributed in kind to its shareholders.
>
> (c) Paying its debts and other liabilities.
>
> (d) Doing all other acts incident to liquidation of its business and affairs.

Defendant argues that this statute does not create personal liability for corporate officers of a dissolved corporation and, therefore, it cannot provide a basis to impose "control person liability under the MUSA." However, whether MCL 450.1833 creates personal liability does not effect whether Diversified Financial continued to exist and operate after it failed to file annual reports.

Moreover, *Bergy Bros, Inc v Zeeland Feeder Pig, Inc*, 415 Mich 286; 327 NW2d 305 (1982), supports plaintiffs' argument that the corporation continued to exist. In *Bergy Bros*, the Court explained that the statute providing for forfeiture of the corporate charter for failure to file annual reports and privilege fees for two years (former MCL 450.91; current 450.1922) does not mean that the corporation ceases to exist. Rather, the statute must be read in light of the statute providing for reinstatement (former MCL 450.432, current MCL 450.1925(2)). Because the charter is subject to reinstatement, a corporation does not cease to exist when its charter is voided for failure to file annual reports and pay the privileges fee. *Id*., p 295. See also *Michigan Laborers' Health Care Fund v Taddie Construction, Inc*, 119 F Supp 2d 698 (ED Mich, 2000) (indicating that when corporate officers carry on business after dissolution unrelated to winding up affairs, the actions are considered to be those of the dissolved corporation and the officers who carry on such business).

To the extent that the trial court granted defendant summary disposition on the basis of its conclusion that defendant could not be the officer or director of Diversified Financial because it was dissolved, the ruling was in error. Indeed, MCL 450.1834 states in part:

> Subject to section 833 [MCL 450.1833] and except as otherwise provided by court order, a dissolved corporation, its officers, directors and shareholders shall continue to function in the same manner as of dissolution had not occurred.

Thus, dissolution does not terminate an individual's role as an officer or director. Because defendant failed to establish the absence of a genuine issue of material fact regarding his liability as an officer or director of Diversified Financial, he was not entitled to summary disposition on that basis.

B. Control

As noted, the trial court ruled that no evidence showed that defendant had direct or indirect control of Diversified Financial. The parties disagree about the correct legal standard to establish "control" under § 410 of the MUSA. Plaintiffs cite *Eastern Vanguard Forex, Ltd v Arizona Corp Comm*, 206 Ariz 399; 79 P3d 86 (2003), and argue that "legally enforceable" control is sufficient, and that defendant had such control as president of Diversified Insurance Services, the majority shareholder of Diversified Financial.

Defendant ignores plaintiffs' reliance on *Eastern Vanguard Forex*, and claims that plaintiffs cannot establish liability under even the most lenient standard used by federal courts to interpret similar federal provisions. He asserts that plaintiffs cannot show that he (1) actually participated in (exercised control over) the operations of the primary violator and (2) possessed the power to control the specific transaction or activity upon which the primary violation is predicated. *Sanders Confectionery Products, Inc v Heller Financial, Inc*, 973 F2d 474, 485-486 (CA 6, 1992), citing *Metge v Baehler*, 762 F2d 621, 631 (CA 8, 1985).

We conclude that resolution of the question whether defendant directly or indirectly controlled a seller under MCL 451.810 is premature because there has been no determination of who the "seller" was in the transactions with plaintiffs. The determination whether a person qualifies as a control person is a complex question of fact. See, e.g., *Hilgeman v Natl Ins Co of Am*, 547 F2d 298, 302 (CA 5, 1977); *Kersh v General Council of Assemblies of God*, 804 F2d 546, 548-549 (CA 9, 1986). Before a court may analyze whether there is an issue of material fact with respect to defendant's liability as a person who directly or indirectly controlled a seller, the court must determine who or what entities qualify as the "seller" in these transactions.[1]

This important issue has not been directly litigated by the parties or decided by the trial court. Defendant based his motion for summary disposition on his argument that Diversified Financial was dissolved. Similarly, the trial court's decision regarding the question of control appears to have been based on its erroneous legal conclusion regarding the effect of that dissolution. Accordingly, we find it necessary to remand this matter to the trial court to reconsider the issue of control in light of our ruling on the effect of the dissolution, and after a determination of the identity of the "seller" under MCL 451.810.[2]

III. Remaining Arguments on Appeal

The parties also present arguments that were raised before but not decided by the trial court.

A. Consent to be an Officer

Defendant maintains that he cannot be liable as an officer or director of Diversified Financial because he never consented to be an officer or director of the company. Citing *West Leechburg Steel Co v Smitton*, 280 Mich 180; 273 NW 439 (1937), he asserts that no duty is imposed on a person who is appointed or elected as an officer unless the person expressly or impliedly accepts the office. The submitted evidence demonstrates that there is a question of fact regarding whether defendant was an officer or director of Diversified Financial.

Annual reports for Diversified Financial from 1989 to 1994 list defendant as an officer (treasurer in 1989-1990; president and resident agent in 1991-1994). Defendant claimed that he first saw the annual reports approximately one week before his deposition and he was not aware before then that he was listed as an officer. He claimed that he did not know who the officers were and, although he was the president of its majority shareholder, he never asked who the officers of Diversified Financial were. John Gakenheimer, who prepared the reports, testified that there were no elections. He put in names because he felt that he needed to fill in a space on

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[1] For example, the court may conclude that Smith's actions, though fraudulent, are deemed those of the corporation through agency principles. See *Paul F Newton & Co v Texas Commerce Bank*, 630 F2d 1111, 1119 (CA 5, 1980).

[2] See *Grossman v Brown*, 470 Mich 593, 599-600; 685 NW2d 198 (2004), in which our Supreme Court, in another context, stated, "To address this matter now, especially because there has been no fact-finding on the disputed factual questions, would be premature."

the form and defendant was one of the few people that Gakenheimer "cooperated with." He explained that defendant was the leader of Diversified Insurance Services and "it made sense, in my mind at that time to put his name in a leadership role."

Carl Smith testified that he understood that defendant was an officer up until the time the corporation dissolved or expired. Smith and Gakenheimer also believed that defendant was an authorized signor on the Diversified Financial bank account. Plaintiffs also presented over one hundred pages of what purport to be minutes of Diversified Financial board of directors meetings. These minutes, which Gakenheimer claims to have prepared, indicate that defendant was present and participated. However, defendant denied being present at any meetings, Gakenheimer and Smith testified that formal meetings did not occur, and Gakenheimer claimed that he fabricated the minutes.

In light of the contradictory evidence regarding defendant's involvement with the company, there is a question of fact concerning whether defendant was an officer or director of Diversified Financial.

B. Officer During Securities Sales

Defendant also argues that no evidence showed that he was an officer or director of Diversified Financial during the years in which Smith made the sales to plaintiffs. He relies on the minutes of the board meetings and the annual reports which ended in 1994, four years before the first sale to plaintiffs. However, defendant is not entitled to summary disposition on this basis. As explained, MCL 450.1834 provides that officers and directors continue to function after dissolution. Thus, if defendant was an officer or director before the dissolution, the dissolution in and of itself did not terminate that role.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ William C. Whitbeck
/s/ Henry William Saad